



STATE OF IDAHO

DEPARTMENT OF HEALTH AND WELFARE

DIVISION OF ENVIRONMENT
2110 Ironwood Parkway
Coeur d'Alene, Idaho 83814
(208) 667-3524

October 28, 1988

CERTIFIED MAIL: P 465 899 176

James Hall, Division Engineer
Federal Highway Administration
Western Direct Federal Division
610 E. 5th Street
Vancouver, WA 98661

RE: Petroleum Contamination of Property
near Avery, Idaho

Dear Mr. Hall:

It is our understanding that you are the responsible engineer for the construction of Highway 50 near Avery, Idaho. Petroleum contamination has been found in sections 15 and 16, R5E, T45N, in the flats on the north side of the St. Joe River. The contamination appears to be diesel fuel which originated from a former train fueling operation on the site. At present, petroleum product is seeping into the St. Joe River. Preliminary examination suggests that subsurface contamination below the highway right-of-way is likely.

We are contacting concerned property owners, and we wish each to be involved to make this a coordinated cleanup effort. We request that you contact this office by November 9, 1988, to discuss the issue. We plan to have a meeting in the near future with the property owners to discuss cleanup of the site.

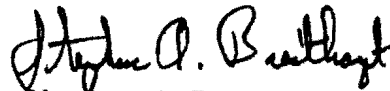
James Hall, Federal Hwy Admin., Vancouver
RE: Contamination near Avery, Idaho

October 28, 1988
Page 2

Your cooperation is greatly appreciated.

Sincerely,

DIVISION OF ENVIRONMENTAL QUALITY

A handwritten signature in dark ink, appearing to read "Stephen A. Breithaupt". The signature is fluid and cursive, with the first name "Stephen" being more prominent.

Stephen A. Breithaupt

Senior Water Quality Specialist

SAB:db

cc: Larry Koenig, IDHW-DEQ, Boise
Joe Baldwin, IDHW-DEQ, Boise



STATE OF IDAHO

DEPARTMENT OF HEALTH AND WELFARE

DIVISION OF ENVIRONMENT
2110 Ironwood Parkway
Coeur d'Alene, Idaho 83814
(208) 667-3524

November 29, 1988

Allan Stockman
Federal Highway Administration
610 East 5th Street
Vancouver, Washington 98661-3893

RE: Avery Landing Petroleum Contamination

Dear Mr. Stockman:

As we discussed in our telephone conversation of November 29, 1988, a meeting will be held at this office on Thursday, December 15, 1988, at 1:00 PM to discuss the petroleum contamination clean-up near Avery, Idaho. The parties to be involved are David Theriault, Potlatch Corporation, and the Shoshone County Public Works Department. Additionally, Joe Baldwin and/or Tim Mosko, from our groundwater unit, will attend. The expected agenda is as follows:

- * History - initial investigations and property owner identification
- * Regulations and clean-up requirements
- * Additional investigations needed
- * Clean-up methodologies
- * Responsibility for clean-up

We would appreciate you confirming this date on or before Monday, December 12, 1988.

Your cooperation is greatly appreciated.

Sincerely,

DIVISION OF ENVIRONMENTAL QUALITY

A handwritten signature in cursive script, reading "Stephen A. Breithaupt".

Stephen A. Breithaupt
Senior Water Quality Specialist

SAB/pvc

cc: Larry Koenig, IDHW-DEQ, Boise



U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Room 312 Mohawk Building
708 S. W. Third Avenue
Portland, Oregon 97204

Subject: State of Idaho Nuisance Action:
Avery Landing Area

Date: June 23, 1989

From: Assistant Regional Counsel

Reply to
Attn. of: HRC-010

To: Mr. J. N. Hall
Division Engineer (HDF-17.25)
Western Federal Lands Highway Division

FACTS

The FHWA acquired a strip of land located along the St. Joe River in Idaho from the Potlatch Corporation. This section of land was previously used as railroad right-of-way and landing area and is surrounded by other land owners, including the Potlatch Corporation.

The State of Idaho's Department of Health and Welfare (Division of Environmental Quality) has allegedly discovered petroleum contamination in the St. Joe River adjacent to these properties. The State of Idaho wants the adjacent landowners to institute actions to abate and clean up this petroleum contamination and as authority for this the State cites the Idaho Code regarding nuisance law. (Attachment)

LAW

There are various forms of common law nuisance. A private nuisance is a substantial and unreasonable interference with a private party's use or enjoyment of land. A public nuisance, on the other hand, is substantial and unreasonable interference with the health, safety or property rights of the community. Both these types of nuisances are classified as either nuisances per se and nuisances in fact. A nuisance per se is generally defined as an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, while a nuisance in fact is commonly defined as an act, occupation, or structure not a nuisance per se, but one which may become a nuisance by reason of circumstances, location, or surroundings. Denny v. United States, 185 F.2d 108 (10th Cir. 1950).

The State of Idaho has cited authority which defines a nuisance broadly and imposes liability to abate the nuisance on successive owners even if these owners were innocent purchasers who were unaware of the nuisance. If the FHWA were a private party, perhaps these Idaho statutes could impose liability for the nuisance allegedly caused from our property.

The FHWA, however, is not a private party but is part of the Federal Government which has certain immunities. The United States as sovereign is immune from lawsuits unless it consents to be sued. United States v. Testan, 424 U.S. 392 (1976). Moreover, this consent cannot be implied but must be unequivocally expressed. United States v. King, 395 U.S. 1 (1969).

The United States has waived its sovereign immunity for certain tortious actions, however, through the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq. The FTCA states "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C. § 2674. Further, both the statute governing the United States as a defendant and the FTCA only allow tort claims against the United States for a "negligent or wrongful act or omission of any employee of the Government." 28 U.S.C. § 1346(b) and 28 U.S.C. § 2675(a).

In Dalehite v. United States, 346 U.S. 15 (1953), the United States Supreme Court ruled on bringing nuisance or other non-negligent tortious actions under the FTCA. The Dalehite court said this in discussing nuisance and the concept of strict liability or liability without fault:

"The Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself." Id. at 44.

The United States Supreme Court has continued to hold that tort suits against the United States arising in strict or absolute liability are not actionable. Laird v. Nelms, 406 U.S. 797, 799 (1972). The Ninth Circuit Court of Appeals has followed these Supreme Court cases. Borquez v. United States, 773 F.2d 1050 (9th Cir. 1985); Thompson v. United States, 592 F.2d 1104, 1107 (9th Cir. 1979). Therefore, since nuisance actions impose liability without fault, they cannot be brought pursuant to the FTCA; and since the FTCA is the only way the United States has consented to be sued for tortious actions like nuisance, the Idaho Code does not provide the State authority to demand action or compensation by us regarding this petroleum contamination.

Another reason the State of Idaho's nuisance theory must fail is that the FTCA is only for "sum certain" money damages. The FTCA does not provide an injunction remedy, i.e., make the United States perform a clean-up action. 28 U.S.C. § 2675; Hatahley v. United States, 351 U.S. 173 (1956); Moon v. Takisaki, 501 F.2d 289 (9th Cir. 1974).

CONCLUSION

If the State of Idaho bases its authority for us to clean up petroleum contamination on a nuisance theory, it must fail. The United States, has not waived its sovereign immunity for nuisance actions under the FTCA and, therefore, we cannot be required to abate this problem allegedly occurring on property we own or be liable for its costs.

Lawrence P. Hanf

Attachment:
Letter 3/31/89



SBX
STX
To: File

STATE OF IDAHO

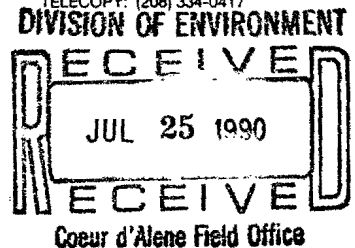
OFFICE OF THE ATTORNEY GENERAL

JIM JONES
ATTORNEY GENERAL

CURT A. FRANSEN
JOHN C. MCCREEDY
DEPUTY ATTORNEYS GENERAL

July 20, 1990

DIVISION OF ENVIRONMENTAL QUALITY
DEPARTMENT OF HEALTH AND WELFARE
1410 N. HILTON, 2ND FLOOR
BOISE, IDAHO 83706
TELEPHONE: (208) 334-0494
TELECOPY: (208) 334-0417



Allan Stockman
Federal Highway Administration
610 East Fifth Street
Vancouver, Washington 98661-3893

Re: Avery Landing

Dear Mr. Stockman:

I am writing concerning the contamination at the Avery, Idaho site. As I understand it, FHA is the present owner of property that once contained fuel tanks used by the Chicago, Milwaukee Railroad. The railroad has gone through a reorganization. Its successor is CMC Real Estate Corporation (CMC). You apparently were a participant in numerous discussions and a meeting in late 1988 and early 1989 concerning the cleanup of the contamination. Since that time, the Idaho Department of Health and Welfare (Department) has received a memo from FHA stating that FHA has no responsibility for the cleanup, at least on a nuisance theory, because the government has not waived its sovereign immunity for such a claim. The Department has also been negotiating with CMC and Potlatch concerning the cleanup. My most recent letters to these parties are enclosed for your review. As indicated in these letters, the Department would like to get the cleanup underway as soon as possible. To that end, we would like to know whether FHA is willing to contribute to the cost of the cleanup.

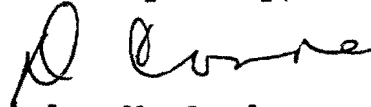
FHA has asserted that it cannot be held liable under a nuisance theory because its sovereign immunity bars such a claim which imposes strict liability. However, Section 313 of the Clean Water Act provides that the federal government and its agencies and departments shall be subject to and comply with all federal, state, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity. Section 313 further provides that it applies notwithstanding any immunity of such agencies, etc. By virtue of Section 313, FHA has waived its sovereign immunity with respect to complying with Idaho's water quality requirements and administrative authority.

Allan Stockman
Page 2
July 20, 1990

The Idaho Environmental Protection and Health Act and the state's water quality regulations, specifically IDAPA §§ 16.01.2300,02 and 16.01.2850,04, prohibit the discharge of pollutants and require the responsible persons to collect, remove and dispose of spilled or released material in a manner approved by the Department.

I would appreciate it if you would give me a call or send me a letter by July 30, 1990 regarding whether FHA will contribute to the cost of the cleanup at the Avery site.

Yours very truly,



Douglas M. Conde
Deputy Attorney General

DMC/pg

cc: Cathy Chertudi
Susan Martin
Paul Jehn
Ed Tulloch

Enclosures



U. S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
610 EAST FIFTH STREET
VANCOUVER, WA 98661-3893

RECEIVED

AUG 22 1990

Office of the Attorney General
DEQ-ICHW

Mr. Douglas M. Conde
Deputy Attorney General
Division of Environmental Quality
Department of Health and Welfare
1410 N. Hilton, 2nd Floor
Boise, Idaho 83706

Re: Avery Landing Petroleum Contamination

Dear Mr. Conde:

This is in response to your July 20, 1990, letter inquiring as to whether the Federal Highway Administration is willing to contribute to the cost of the clean up of the petroleum contamination of the former Chicago, Milwaukee Railroad Avery Landing property adjacent to the St. Joe River near Avery, Idaho.

The Chicago, Milwaukee Railroad used this property from the 1910's through 1970's to service and fuel its railroad locomotives. Published reports in the local newspapers indicate that the petroleum contamination was the result of the railroad's fueling and/or maintenance operations. See St. Maries Gazette Record, August 30, 1989, October 18, 1989, and April 4, 1990.

Potlatch Corporation purchased the railroad line from Avery to St. Maries, including the Avery Landing property, except that portion owned by Harold Thereault, from the Chicago, Milwaukee Railroad on May 15, 1980.

Through condemnation proceedings, the United States acquired the railroad right-of-way from Potlatch Corporation on October 16, 1986. Potlatch and Thereault retained ownership of the Avery Landing property.

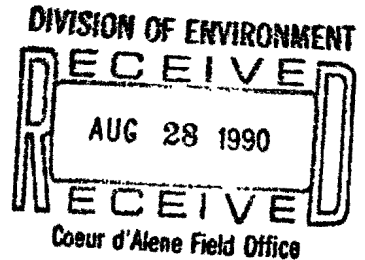
Since the acquisition of the 150-foot wide railroad right-of-way north of Avery Landing, the United States has not discharged any petroleum products on its property or Avery Landing property. Given the previous use of Avery Landing for some 60 years for servicing and/or fueling railroad locomotives, the local newspaper reports that the petroleum products were discharged by the Chicago, Milwaukee Railroad are probably accurate. We understand that similar petroleum contamination has been discovered at many other railroad servicing and fueling stations. See enclosed Great Falls Tribune December 6, 1988, article regarding the Burlington Northern Railroad's agreement to clean up petroleum contamination at 12 diesel storage and fueling stations in Montana.

Ed Tullach
CDA Field
ofc - EQ
SBX
LP -
ST /
ETX

AUG 20 1990

IN REPLY REFER TO

HFL-17



AUG 26 1980

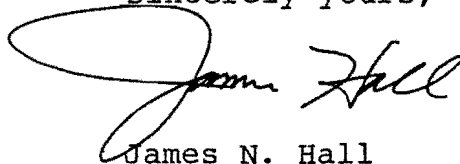
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In that the United States has not discharged any petroleum products within the former railroad right-of-way or Avery Landing, or contributed in any other manner to the petroleum contamination of the Avery Landing property, it is not legally responsible for the clean up of the petroleum contamination. Such responsibility, if any, would appear to lie with the Chicago, Milwaukee Railroad and its successor corporation, CMC Real Estate Corporation.

In the absence of any legal responsibility for the petroleum contamination, the Federal Highway Administration does not have any statutory authority to spend Federal-aid highway trust funds to assist the State in the clean up of the petroleum contamination. The State may wish to contact the Federal Environmental Protection Agency to determine whether it administers any Federal programs which could financially assist the State in the clean up.

Any further correspondence regarding legal responsibility for clean up costs should be directed to our legal counsel, Deputy Regional Counsel James F. Zotter at Suite 600 - KOIN Center, 222 S.W. Columbia Street, Portland, Oregon 97201 (telephone: 503/326-2076).

Sincerely yours,

A handwritten signature in black ink, appearing to read "James Hall", with a large, stylized loop at the beginning.

James N. Hall
Division Engineer

Enclosure:
Newspaper Article

cc: Allan Stockman (HPD-17.25)
James F. Zotter (HRC-010)



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DEC 06 1991

IDHW-DEQ
Coeur d'Alene Field Office

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LARRY ECHOHAWK
ATTORNEY GENERAL

December 3, 1991

DIVISION OF ENVIRONMENTAL QUALITY
DEPARTMENT OF HEALTH & WELFARE
1410 N. HILTON, 2ND FLOOR
BOISE, IDAHO 83706
TELEPHONE: (208) 334-0494
FACSIMILE: (208) 334-0576

CURT A. FRANSEN
JOHN C. MCCREEDY
DOUGLAS M. CONDE
KEVIN J. BEATON
DEPUTY ATTORNEYS GENERAL

Michael E. McNichols
Clements, Brown & McNichols
P.O. Box 1510
Lewiston, ID 83501

Re: Avery Landing

Dear Mike:

In your absence, I discussed with Robert Brown the addition of the Federal Highway Administration (FHA) as a party to a settlement regarding the Avery Landing site. The Department, at this time, will not proceed with further action against FHA for the following reasons:

(1) This site has been left unresolved for a significant period of time. The FHA has made it clear that it will not contribute financially to a cleanup of this site. The involvement of the FHA at this point would only serve to delay needed remediation.

(2) It is certainly Potlatch's right to proceed against the FHA if it so desires.

(3) The most likely means of avoiding a sovereign immunity defense from FHA, if that is possible, is to proceed via CERCLA. It is the Department's intent to avoid CERCLA.

I also was informed by Mr. Brown that Potlatch intends to burn the recovered product in its burners at the St. Maries rather than the Lewiston plant. Burning the product at the St. Maries plant may require Potlatch to obtain an air quality permit to construct. It is DEQ's understanding that the burners at St. Maries presently burn wood waste. Burning the recovered product at this plant would most likely constitute the modification of a stationary source which would require Potlatch to obtain a permit to construct pursuant to IDAPA § 16.01.1012. On the other hand, burning the product at the Lewiston plant should not require a change in the existing permit. If you have any further questions regarding the air permit requirements, please call Martin Bauer at 334-5898.

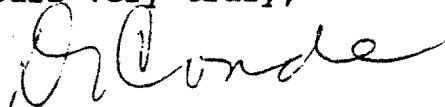
James F. Zotter
Page 2
January 15, 1992

discharge to a Special Resource Water that reduces the ambient water quality. The continued discharges from the property apparently owned by FHA has reduced the water quality of the St. Joe River and has impacted the beneficial uses of the ground water in the area and the St. Joe River in violation of the Water Quality Standards. The water of the St. Joe River has literally turned black from the material discharged from the ground water seeps. The FHA, as the current owner of the property in question, is a responsible person with respect to the petroleum products or other contaminants released from this property. FHA's sovereign immunity has been waived with respect to complying with Idaho's water quality requirements and administrative authority pursuant to § 313 of the Clean Water Act.

The state intends to continue its negotiations with Potlatch and CMC. If FHA does not contribute to the resolution of this matter, the Department may proceed with a civil or administrative enforcement.

Please give me a call to discuss this matter further. I would appreciate a response by January 31, 1992.

Yours very truly,



Douglas M. Conde
Deputy Attorney General

DMC/lvh

cc: Mike McNichols
Joe Nagel
Grace Angelos
Lisa Prochnow, "

RECEIVED

JAN 17 1992

IDHW-DEQ
Coeur d'Alene Field Office



U.S. Department
of Transportation
**Federal Highway
Administration**

Region 10
Alaska, Idaho,
Oregon, Washington

KOIN Center, Suite 600
222 S.W. Columbia Street
Portland, Oregon 97201

February 6, 1992

In reply refer to:
HRC-010

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FEB 10 1992

Office of the Attorney General
DEQ-ICSW

Douglas M. Conde, Esq.
Deputy Attorney General
Department of Health & Welfare
1410 N. Hilton, 2nd Floor
Boise, Idaho 83706

Re: Seepage of Petroleum into St. Joe River

Dear Mr. Conde:

We have reviewed your January 15, 1992, letter concerning the seepage of petroleum products from the former Chicago, Milwaukee Railroad maintenance and repair facilities near Avery, Idaho, into the St. Joe River. The Milwaukee Railroad used this facility to maintain, repair, and fuel railroad engines from about 1910 until 1980 after which it abandoned service and sold the railroad line from Avery to St. Maries, Idaho, including the Avery landing, to the Potlatch Corporation (hereafter Potlatch).

On May 16, 1986, the United States through a condemnation process acquired the railroad right-of-way, but not the Avery landing maintenance and repair yard, from Potlatch for the relocation of the St. Joe River Road. The 150-foot wide strip of former railroad right-of-way which the United States acquired runs along the northern border of the railroad maintenance yard furthest from the St. Joe River.

At the time the United States acquired the right-of-way, a large steel petroleum storage tank was partially located on the condemned property. The petroleum products remaining in the storage tank had jelled or solidified. Pursuant to our agreement with the Potlatch Corporation, Potlatch arranged for the removal of the storage tank. The jelled petroleum products were chemically treated so that they could be pumped into tank trucks and hauled to authorized disposal areas. When the tank was dismantled, the crushed gravel base under the steel tank was clean. That is, the gravel did not show any leakage of petroleum product from the tank.

Your letter implies that the United States discharged or released petroleum products onto its property subsequent to its acquisition of the property in October 1986. This is incorrect. The petroleum products which presently contaminate the Avery landing property and are now seeping into the St. Joe River were most likely discharged or released by the Milwaukee Railroad during the period 1910

through 1980 when it used the property extensively for railroad engine maintenance, repairs, and refueling. Such railroad operations typically involved draining engine oil, lubricating engines, cleaning engines with solvents, and refueling with diesel fuel.

One of our former employees has informed us that the railroad also dumped waste into a settling pond on the property. It is obvious that the culprit in this case was the Milwaukee Railroad -- not the Potlatch Corporation or the United States.

We have reviewed the Federal Clean Water Act, 33 U.S.C. § 1251 et seq., specifically § 1323(a), and the Idaho Water Quality Standards and Wastewater Treatment Requirements, IDAPA § 16.01.2001 et seq., specifically §§ 16.01.2300.01, 16.01.2300.02, and 16.01.2850.04, cited in your letter.

The United States has waived its sovereign immunity under 33 U.S.C. § 1323(a) only in those instances where its activities result in the discharge or the run-off of pollutants. As explained above, the United States has not engaged in any activity which resulted in the discharge or run-off of petroleum products into the St. Joe River. At most, the United States is the innocent purchaser of property which had previously been polluted with petroleum products by the Milwaukee Railroad.

Moreover, the specific Idaho Water Quality Standards which you cite only apply to the discharge of pollutants or the release of petroleum products. Again, the United States has not discharged or released anything. IDAPA § 16.01.2300.01 states:

" . . . no new point source can discharge, and no existing point source can increase to discharge . . . to any water"

IDAPA § 16.01.2003.11 defines discharge as "the release of a pollutant into the waters of the state."

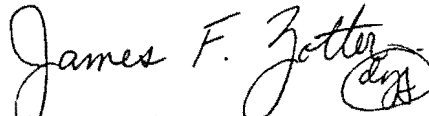
In that the United States has not discharged or released any pollutant on the property which it acquired or into the St. Joe River, it has not committed a violation within the meaning of these administrative rules, nor has the United States violated IDAPA § 16.01.2850. That rule prohibits:

". . . authorized release[s] of hazardous materials, and petroleum products to state waters or to land such that there is a likelihood that it will enter state waters"

Again, the United States has not released any petroleum products.

The Idaho Water Quality Standards do not impose responsibility on the innocent purchasers to pay clean up costs of property that has been previously polluted with petroleum products. Rather, the Idaho standards place the responsibility on the person or persons who discharged or released the pollutant onto the land or into the river, i.e., the Milwaukee Railroad. It is fundamentally unfair and legally insupportable to claim that the United States is responsible for the clean up of the petroleum products that are seeping from the former Milwaukee Railroad property into the St. Joe River. We are prepared to continue to cooperate with the State with respect to the use of the highway right-of-way in the clean up of the petroleum pollution, for example our installation of culverts through our roadbed embankments to facilitate such clean up efforts, but our highway statutes do not authorize or envision expending funds appropriated for the construction of highways to clean up petroleum contaminated property for which we are not factually or legally responsible.

Sincerely yours,

A handwritten signature in cursive script that reads "James F. Zotter". To the right of the signature is a small circular stamp containing the word "copy".

James F. Zotter
Deputy Regional Counsel

cc: J. N. Hall (HDF-17)
A. J. Stockman (HPP-17.25)

Joe Nagel
Lisa Brochman
Clyde Cody